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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1960

No. ~~999~~ 139

LEROY L. WILSON,

Petitioner,

vs.

SOUTHERN FARM BUREAU CASUALTY COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

H. ALVA BRUMFIELD,
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New Orleans, Louisiana;

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Murray Printing Co., The Rose Printing Co., Inc., New Orleans, La.

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LeROY L. WILSON,

Petitioner,

versus

SOUTHERN FARM BUREAU CASUALTY COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

LeRoy L. Wilson, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW:

No opinion of the District Court in *Wilson v. Southern Farm Bureau Casualty Company* was written; the opinion of the Fifth Circuit Court of Appeals in this case (Appendix A *infra*, pages 18-27) is reported at 275 Fed. (2d) 819.

JURISDICTION.

The jurisdiction of the Fifth Circuit Court of Appeals in *Wilson v. Southern Farm Bureau Casualty Company*, No. 18056, was entered on March 11, 1960 (Appendix B *infra*, page 27). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED.

(1) Whether a State Court, sitting as a finder of fact, can impose a duty upon a federal jury sitting in cases involving similar facts (in this case, left turn) to treat those facts with the same weight, significance and presumptions that it, the State Court, as a finder of fact, did in other cases.

(2) Whether a State Court, as a finder of fact, can bind the federal courts to instruct the federal juries to apply the same weight, burdens and presumptions to specific factual situations as the State Court would.

(3) Whether a federal jury can be charged under the authority of the Erie doctrine to apply the same weight, burdens and presumptions that a State Court as a finder of facts would apply to a similar situation.

STATUTES INVOLVED.

(1) Constitution of the United States, Amendment 7.

(2) 7 U. S. A.-R. S. 32:235, 236 (Appendix C *infra*).

STATEMENT.

The accident which formed the basis of this lawsuit occurred in East Baton Rouge Parish, Louisiana, at the intersection of the Airline Highway and Winbourne Avenue. At that point the Airline Highway is a four-lane thoroughfare divided by a neutral ground and intersected by Winbourne Avenue, which is a two-lane avenue without a neutral ground. There are stop signs facing traffic on Winbourne as it approaches the Airline Highway. On the Airline Highway on both sides of the Winbourne intersection the neutral ground has a cutaway section for traffic intending to make a left turn to pull into the neutral ground in order that through traffic can proceed. On April 15, 1957, at approximately noon, appellant was proceeding north on the Airline Highway intending to make a left turn into Winbourne Avenue. He was alone. (Tr. p. 168.) He stopped in the neutral ground and waited for some traffic to pass. According to the testimony (Tr. p. 169), there was an automobile traveling south in the outside lane of the southbound Airline traffic with a milk truck following it. The truck pulled out from behind the automobile and moved into the inside lane of the Airline and turned on his blinking signal light for a left turn. After the automobile in the outside lane passed the Winbourne intersection the appellant pulled from a stopped position across the Airline into Winbourne when the milk truck, not turning, but continuing ahead, struck him. The actual point of impact was two feet from the edge of the Airline Highway. (Tr. pp. 39-45.) The two front wheels of appellant's automobile were completely off and out of the Airline Highway at the time of the impact. The milk truck laid down 47 feet of skid

marks angling from the inside lane of the Airline to the outside lane and to the point of impact. There is no question but that there was ample room to pass behind the appellant's automobile. The evidence discloses that from a stopped position to the point where the accident occurred it would take the average automobile 5.11 seconds to traverse that distance, which was 45 feet. On similar intersections a survey revealed an average of 4.95 seconds. (Tr. pp. 99-128.) At the time the appellant left his stopped position to negotiate the left turn the milk truck would have to have been, if it were traveling at the maximum speed of 45 miles per hour, 300 feet from the point of impact, and at 45 miles per hour, the milk truck could have stopped, including reaction time, in 162 feet. The evidence amply demonstrates that at lower speeds the milk truck would have been closer to the point of impact, but the stopping distance would have been appreciably shorter for the reduced speed, and in no case could there have been an accident if the driver of the milk truck, at whatever speed he may have been driving, had applied his brakes when he saw or should have seen the appellant's automobile begin its left turn. We have utilized the 45-mile-per-hour speed for the reason that that was the speed limit for the truck. The terrific force of the impact shows that the truck was still traveling at a considerable speed as it knocked the appellant's automobile completely out of the intersection, sideways. Ralph D. Jackson, the driver of the truck, was route supervisor for Kleinpeter Farms Dairy, the insured. He had been working approximately nine hours when this accident occurred. (Tr. pp. 61-62.) He testified that

he first saw the appellant's car in a parked position between the neutral grounds when he was about two or two and one-half blocks away. (Tr. p. 67.) Contrary to the evidence of the police officers, George Herman Reily, Jr., and Sgt. Watson (Tr. pp. 194-196), both Ralph Jackson and his passenger, Dan Miller, testified that the accident occurred in the middle of the southbound lanes of the Airline, but Sgt. Watson testified that according to the skid marks the truck, at the moment of the impact, was entirely in the outside lane, leaving the inside lane free for traffic to pass.

As a result of this accident the appellant was disabled for life as a result of brain damage. He suffered a paralysis of the right side, particularly centered around the right arm and also involving the right leg. (Tr. pp. 156-163.) The other testimony in the case shows that Wilson is able to do very little around his home. (Tr. pp. 180-184.) He has earned nothing since the accident. He has no control over his sanitary habits.

This case was tried to a jury which was out approximately two hours and 40 minutes and returned stating that it was impossible to reach a verdict. Thereupon the District Court rendered its "dynamite" charge. Twelve minutes after the dynamite charge the jury returned with a verdict for the defendant.

The Fifth Circuit Court of Appeals affirmed the judgment of the District Court. The petitioner then filed a petition for a writ of certiorari.

REASONS FOR GRANTING WRIT.

Under the law of the State of Louisiana, the Courts of Appeal and the Supreme Court, sitting as appellate courts, review both the law and the facts. These courts very frequently reverse the court of original jurisdiction, whether the case was tried to a jury or to the court alone, on the weight of the evidence. The criterion for such a reversal or affirmance, as it may be, is not, as in the federal court or common law courts, whether there was evidence upon which the jury or court could reasonably have arrived at that decision but what the greater weight of the evidence, in the opinion of the reviewing court, indicates the verdict should have been. In so doing, the appellate courts of Louisiana, in writing up what in its opinion the applicable law is, in addition thereto, states its findings of fact, the weight and significance that it gives to the facts, and the reasoning process by which it arrived at its final decision.

The wording of these opinions, insofar as they state the law of the State of Louisiana, are proper charges to be given of the jury in federal court diversity cases involving Louisiana law. The portions of these opinions which are not stating the law of Louisiana but which state the weight and significance that these appellate courts gives to specific facts are not proper charges because to so charge the jury would impose an obligation upon the jury to disregard its own reasoning process, ideas or opinions and substitute the reasoning process ideas or opinions of the state appellate court sitting as a finder of fact. The effect of using such charges deprives the litigant of the independent opinion, decision, and determination of the jury and therefore a trial by jury.

I.

A Charge Which Takes Away the Reasoning Power of a Jury Is Unconstitutional Because It Deprives the Plaintiff of a Jury Trial.

A. The Objectionable Charge.

The District Court charged the jury in accordance with the defendant's requested charge No. 1 as follows:

> "Under the Louisiana State Highway Regulatory Law a driver attempting to make a left turn on a public highway must make certain that the turn can be made without danger to normal overtaking or on-coming traffic, and he must yield the right of way to such vehicles. When a left turn is being made and an accident occurs, the burden rests heavily on the driver who is making the left turn to explain how the accident occurred, and to show he was free from negligence."

B. The Challenge to the Charge.

Counsel for the plaintiff in the District Court objected to the defendant's charge No. 1 as follows:

> "The Plaintiff excepts to the Defendant's Charge Number One, which was granted and given, for the reasons that the charge itself does not contain the exceptions to that charge, which, of course, is the doctrine of last clear chance. And the charge is also objectionable because of the use of the word 'heavily' on there, which the burden actually is the same burden that rests on the person who is claiming negligence or any other defense or any other assertion, and the use of the word 'heavily' is super-

fluous and put a greater emphasis on that particular charge than on the other charges, contrary to what the intent and purpose of the charges are."

ARGUMENT.

At the outset we wish to point out that the Louisiana Highway Regulatory Law imposes no such burden on a driver negotiating a left turn as indicated in the charge. What L. S. A.-R. S. 32:235 actually states is:

> "The driver of any vehicle on the highways of this state shall ascertain, before turning around upon any highway, that there is no traffic, vehicular or pedestrian, approaching from other direction which will be unduly delayed and shall yield right of way to such approaching traffic and shall not attempt to make a turn unless the way is clear."

This state statute does not in fact mention a left turn but deals with vehicles in the process of "turning around". However, assuming that a vehicle turning left should be interpreted as turning around, the statute does not, as stated in the charge, require the driver to "make certain" that the left turn can be made without danger to normal overtaking or oncoming traffic. He must yield the right of way to such vehicles. Clearly this interpretation of the Louisiana statutes is nothing more than what the Louisiana Courts of Appeal, as finders of fact, require as a standard for motorists making left turns. The quoted statute makes no mention of an accident or where the burden rests if an accident occurs but the offending charge was in fact advising the jury that the statute of the State of Louisiana required them to hold a motorist making a

left turn negligent because the charge states "the burden rests heavily upon the driver who was making the left turn to explain how the accident occurred, and to show he was free from negligence". Clearly those words are not expressions of the Louisiana State Highway Regulatory Law and they have no more dignity than does the reasoning process by which that particular court on that particular case determined the effect of a left turn on the causation of that particular accident. The fact that an appellate judge as a trier of fact in a Louisiana case considered a left turn to constitute negligence in a particular case, and the fact that he felt that a driver making such a left turn has a heavy burden to explain how the accident occurred and to show he was free from negligence is a far different thing from how twelve jurors might consider a left turn in a different accident. However, if these opinions as to facts of the State Court finders of fact are charged to the jury as being the law to be applied to the case, there is then no decision for the jury to make. The jury's reasoning process is bypassed and the plaintiff is deprived of the trial by jury. The Court of Appeals, in its opinion, made it clear that it felt the charge did not reflect the law of Louisiana as set out in the statutory language when it stated:

> "Comparing the challenged charge with the statutory language prescribing the duty of a motorist turning his vehicle, we might be inclined to agree with the appellant. The statutory duty is couched in the same language as that used in the statutes of other states. * * * Unfortunately for the appellant, however, the Court of Appeals of

Louisiana, Orleans, has declared the law in almost the precise terms used in the charge:

> "'The State Highway Regulatory Law, L. S. A.-R. S. 32:235, 236, makes it clear that a driver attempting to turn to his left on a public highway must make certain that it is safe to do so. When such a left-hand turn is being made and an accident occurs, the burden rests heavily on the driver who is making the left-hand turn to explain how the accident occurred and to show that he was free from negligence.'"

And the appellate Court went on to say:

> "The language quoted * ** is so phrased as to announce a general principle of law and, accordingly, we consider it binding upon this Court under the Erie doctrine."

It is apparent then that we have the federal courts considering that it is bound to charge the jury sitting in a diversity case to consider a particular act with the same degree of seriousness that the State Court as a finder of fact would consider it.

C. Erie Doctrine Is No Authority for Binding Federal Juries with Thought Process of State Court as a Finder of Facts.

The Fifth Circuit Court of Appeals was in error when it considered itself bound by the Erie doctrine in this matter. *Erie Railroad Co. v. Tompkins*, 1938, 304 U. S. 64.

Under the application of the Erie doctrine, a federal court is not bound by the findings of fact of a Lou-

isiana appellate court in a particular case. L. S. A.-R. S. 32:235 does not say that all persons who make left-hand turns are *per se* negligent. The proximate cause of an automobile accident can only be determined by a hearing of all the facts connected with such accident. When a Louisiana appellate court finds as a matter of fact that a left-hand turn is highly dangerous, this is not substantive law but is merely an opinion of the finder of facts, in this case a judge, in a particular case.

It is not a matter of substantive law and therefore the federal courts are not bound by the Erie doctrine to charge a jury as to the factual opinions of a Louisiana appellate court sitting as a finder of facts.

The Fifth Circuit was quick to point out that it is a difficult task to distinguish between conclusions of law and findings of fact of a Louisiana appellate court:

> "Federal courts are forbidden by the seventh amendment to reexamine any fact tried by a jury otherwise than according to the rules of the common law, while Louisiana state courts can review the facts in all civil cases. As a consequence of that situation, in civil jury cases federal courts evaluating decisions of Louisiana state courts as precedents have the difficult task of separating the decisions of the Louisiana courts on the law from their review of the facts." *Wright v. Paramount-Richards Theatres, Inc.*, 5th Cir., 198 Fed. (2nd) 303, 306.

But here there is no doubt that it is merely the opinion of a finder of facts as to what emphasis is placed

on a left-turn maneuver. There are numerous cases in Louisiana jurisprudence where a person making a left-hand turn was not held to be negligent. The case of *Green v. Plummer*, La. App., 119 So. (2d) 862 (1960) is a very recent one decided on April 25, 1960.

In *Johnson v. Wilson*, La. App. 97 So. (2d) 671, 678, 679, Judge Tate as the organ of the Court stated that there were three possible solutions to an accident involving a left-hand turn depending on "infinitely variable circumstances":

> "As we recently reiterated in Jenkins v. Fidelity & Cas. Co., La. App., 92 So. (2d) 120, at page 123:
>
> > "'It is well settled in Louisiana that the operator of a motor vehicle who desires to make a left turn, carries the the responsibility of being certain that the turn can be made without danger to NORMAL overtaking or oncoming traffic, and he must yield the right of way to such vehicles.'" (Emphasis ours.)
>
> "Applying these general principles to the infinitely variable circumstances of the accidents concerned, cases involving the left-turning forward driver struck by an overtaking or oncoming vehicle fall into at least three general patterns:
>
> "(1) Cases holding that the sole proximate cause of the accident was the negligence of the driver turning left suddenly and or without signal and in the immediate path of and without yielding the right of way to approaching traffic.

Washington Fire & Marine Ins. Co. v. Firemen's Ins. Co., 232 La. 379, 94 So. (2d) 295; Castille v. Houston Fire & Cas. Ins. Co., La. App., 1 Cir., 92 So. (2d) 137; Aetna Cas. & Surety Co. v. Crow, La. App., 1 Cir., 86 So. (2d) 212; Messina v. Audubon Ins. Co., La. App., 1 Cir., 67 So. (2d) 143; Graves v. Riser, La. App., 2 Cir., 62 So. (2d) 163; Day v. Roberts, La. App., 2 Cir., 55 So. (2d) 316; or holding that the left-turning driver had the clear chance to avoid the accident, Cassar v. Mansfield Lbr. Co., 215 La. 533, 41 So. (2d) 209.

"(2) Cases holding that the negligence of the left-turning driver in doing so without signalling and or yielding the right of way and or observing the rear vehicle; and of the overtaking driver in not making sufficient observation and or failing to slow and or continuing to approach the turning vehicle at a high speed; both contributed to the accident so as to bar recovery by either party. Leonard v. Holmes & Barner, Ltd., 232 La. 229, 94 So. (2d) 241; Fox v. Haynes, La. App., 2 Cir., 86 So. (2d) 583; LaBarre v. Booth, La. App., 1 Cir., 84 So. (2d) 626; Saba v. Brown, La. App., Orleans, 61 So. (2d) 593; Fidelity & Cas. Co. of New York v. Major Oil Co., La. App., 2 Cir., 55 So. (2d) 326; Seaboard Ins. Co. v. Maryland Cas. Co., La. App., 2 Cir., 47 So. (2d) 353. See also: Washington Fire & Marine Ins. Co. v. Wallace Co., La. App., 2 Cir., 92 So. (2d) 777 and Jenkins v. Fidelity & Cas. Co., La. App., 1 Cir., 92 So. (2d) 120.

"(3) Cases holding free of negligence the left-turning driver, who made proper signal and

commenced a left turn upon a reasonable belief after observing approaching traffic that such turn would not unduly interfere with the progress of such approaching traffic despite which an accident occurred; the sole proximate cause of which was held to be the excessive speed, lack of lookout, and or lack of control on the party of the approaching vehicle in failing to observe the seasonably-signalled left-turn intent of the other vehicle and continuing an approach theretowards without attempting to bring the approaching vehicle under control. Delaune v. Crawford, La. App., 1 Cir., 39 So. (2d) 94; Chandler v. Sentell, La. App., 1 Cir., 35 So. (2d) 260; Deffez v. Stephens, La. App., 1 Cir., 30 So. (2d) 154; Goynes v. St. Charles Dairy, Inc., La. App., 1 Cir., 197 So. 819; White v. American Employers Ins. Co., La. App., 1 Cir., 197 So. 803. See also: Monerieff v. Lacobie, La. App., 1 Cir., 92 So. (2d) 471; Moore v. Benson, La. App., 2 Cir., 68 So. (2d) 250; Sumrall v. Myles, La. App., 1 Cir., 51 So. (2d) 411; Russo v. Aucoin, La. App., 1 Cir., 7 So. (2d) 744; Weitkam v. Johnson, La. App., Orleans, 5 So. (2d) 582.

"We do not think to be manifestly erroneous the determination of the trier of fact that the instant accident falls within the group of cases of the latter factual pattern, so that the negligence of the overtaking driver herein constitutes the sole proximate cause of the present accident."

These cases are decided on the facts involved in each particular case. For a federal jury to be bound by

the reasoning of a Louisiana appellate judge as to his appreciation of a factual situation in a particular case deprives a party litigant of his constitutional right to a trial by jury. The jury is no longer the trier of facts but takes its facts from the Louisiana appellate courts.

By binding a federal jury with the thought process of the Louisiana appellate courts on factual matters, matters upon which reasonable men may differ, the right to a trial by jury has been usurped. The Louisiana party plaintiff suing in a United States District Court under the facts in this case is deprived of his right to a trial by jury as guaranteed by the Seventh Amendment of the United States Constitution.

The jury no longer is the independent finder of facts but takes its facts as found by the State Court.

By charging the jury as such the Court is saying that a person executing a left-hand turn which results in an accident is presumed to be negligent and he has the burden of overcoming this presumption by positive evidence. This is not provided for by L. S. A.-R. S. 32:235.

As a general rule, he who alleges negligence must prove it. The sole and exclusive function of the jury is eliminated. From specific findings of fact in a particular State Court case, general conclusions of fact are found and these are charged to the federal jury binding their independent and reasonable fact-finding powers, thus depriving the petitioner here of his constitutional right of trial by jury.

IN CONCLUSION.

There is no law in Louisiana which states that a person making a left-hand turn is presumed to be negligent.

Whether a person executing or attempting to execute a left-hand turn is negligent depends upon the facts in each case. The finder of facts, whether it be judge or jury, has the duty of determining who is negligent in a particular case.

If a Louisiana appellate court as a finder of facts decides that a particular individual under a particular set of facts was negligent, that is within their province as a finder of fact.

However, the charging of a federal jury as a matter of law, which in truth is a conclusion of fact, that a left-hand turn is highly dangerous, takes away the function of a jury and deprives the petitioner of his constitutional right to a trial by jury.

The petitioner respectfully submits that the Fifth Circuit Court of Appeal was in error in affirming the judgment of the United States District Court for the Eastern District of Louisiana, and the petitioner therefore prays that this Honorable Court grant this petition for a writ of certiorari, and reverse the judgment of the Fifth Circuit Court of Appeals and grant the petitioner a new trial.

Respectfully submitted,

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New Orleans, Louisiana.

PROOF OF SERVICE.

I, H. Alva Brumfield, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari on Robert J. Vandaworker, counsel for respondent, by mailing a copy thereof, postage prepaid, addressed to his office at the Louisiana National Bank Building, Baton Rouge, Louisiana.

Dated this day of June, 1960.

H. ALVA BRUMFIELD

APPENDIX "A".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18056

LEROY L. WILSON,

Appellant,

versus

SOUTHERN FARM BUREAU CASUALTY COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(March 11, 1960.)

Before RIVES, Chief Judge, and HUTCHESON and TUTTLE, Circuit Judges.

RIVES, Chief Judge: This appeal is from a judgment for the defendant entered upon a jury's verdict. The plaintiff sought recovery from the defendant insurance company under the Louisiana Direct Action Statute

for extremely severe personal injuries suffered in an automobile collision.

The collision occurred in the outskirts of Baton Rouge, Louisiana, at the intersection of Airline Highway and Winbourne Avenue. Airline Highway runs generally north and south and Winbourne Avenue intersects it at right angles. Airline Highway is a four-lane thoroughfare, with the northbound lanes separated from the southbound lanes by a neutral ground. Winbourne Avenue is a two-lane street. Stop signs face traffic approaching Airline Highway from Winbourne Avenue. On Airline Highway on either side of the Winbourne Avenue intersection the neutral ground has a cutaway section for cars intending to make a left turn to pull into and stop before proceeding across the two lanes for traffic approaching from the opposite direction. Airline Highway is level and straight at the intersection and for a long distance in each direction.

The collision occurred at approximately noon on April 15, 1957. The weather was clear and dry. The speed limit on Airline Highway was sixty miles per hour for automobiles and forty-five miles per hour for trucks.

Appellant, alone in a Mercury automobile, was proceeding north on Airline Highway intending to make a left turn into Winbourne Avenue. He stopped in the neutral ground and waited for some traffic to pass. The milk truck of appellee's insured was being driven south on Airline Highway at a speed of about forty-five miles per hour. Each driver saw the other vehicle for a considerable time before the collision. The milk truck had

been behind another automobile in the outside lane of the southbound Airline traffic, but before reaching the intersection, it pulled from the outside lane and moved into the inside lane next to the neutral ground.

The appellant testified that the milk truck was blinking a signal light for a left turn, but this was denied by several witnesses for the appellee. The collision occurred when the appellant moved the Mercury automobile from a stopped position in the neutral zone and was crossing the southbound traffic lanes of Airline Highway. The milk truck laid down 47 feet of skid marks angling from the inside lane of Airline Highway to the outside lane and to the point of impact. It struck the right center of the Mercury automobile broadside.

The appellant does not argue that he was entitled to judgment as a matter of law, but specifies several claimed procedural errors, each of which will be considered.

The district court charged the jury in accordance with defendant's requested charge No. 1 as follows:

> "Under the Louisiana State Highway Regulatory Law a driver attempting to make a left turn on a public highway must make certain that the turn can be made without danger to normal over-taking or on-coming traffic, and he must yield the right of way to such vehicles. When a left turn is being made and an accident occurs, the burden rests heavily on the driver who is making the left turn to explain how the accident occurred, and to show he was free from negligence."

The plaintiff duly objected to the giving of that charge, as follows:

> "The Plaintiff excepts to the Defendant's Charge Number One, which was granted and given, for the reasons that the charge itself does not contain the exceptions to that charge, which, of course, is the doctrine of last clear chance. And the charge is also objectionable because of the use of the word 'heavily' on there, which the burden actually is the same burden that rests on the person who is claiming negligence or any other defense or any other assertion, and the use of the word 'heavily' is superfluous and put a greater emphasis on that particular charge than on the other charges, contrary to what the intent and purpose of the charges are."

Comparing the challenged charge with the statutory language prescribing the duty of a motorist turning his vehicle,[1] we might be inclined to agree with the appellant. The statutory duty is couched in the same language as that used in the statutes of other states. Such statutes are generally construed so as not to "convert one wishing to turn into an insurer or others approaching nor prohibit his turning until the circumstances render his crossing

[1] 236. **Signals for stopping, starting, or turning**

A. The driver of any vehicle upon a highway of this state before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and, if any pedestrian may be affected by such movement, shall give clearly audible signal by sounding the horn, and, whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this Section, plainly visible to the driver of such other vehicle, of the intention to make such movement." La. Rev. Stat. 32 236A

absolutely free from danger." 2 Blashfield Cyclopedia of Automobile Law and Practice, Section 1121, p. 430. In Louisiana, "a motorist who desires to make a left turn on a city street is not required by law to wait until there is no traffic in sight before attempting to do so." *Kelly v. Neff*, La. App., 1943, 14 So. (2d) 657, 669; *Mouricett v. Lacobie*, La. App., 1956, 89 So. (2d) 471. Unfortunately for the appellant, however, the Court of Appeals of Louisiana, Orleans, has declared the law in almost the precise terms used in the charge:

> "The State Highway Regulatory Law, LSA-R.S. 32:235, 236, makes it clear that a driver attempting to turn to his left on a public highway must make certain that it is safe to do so. When such a left-hand turn is being made and an accident occurs, the burden rests heavily on the driver who is making the left-hand turn to explain how the accident occurred and to show that he was free from negligence."

Collier v. Occhipinti, La. App., 1952, 57 So. (2d) 697, 699. See also, *American Fidelity and Casualty Co. v. Dreyler*, 5 Cir., 1955, 220 F. (2d) 930, 933; *Seale v. Stephens*, La. App., 1946, 24 So. (2d) 651, 653; *Aetna Casualty & Surety Co. v. Crow*, La. App., 1956, 86 So. (2d) 212, 214.

Admittedly, "in civil jury cases federal courts evaluating decisions of Louisiana state courts as precedents have the difficult task of separating the decisions of the Louisiana courts on the law from their review of the facts." *Wright v. Paramount-Richards Theatres*, 5 Cir., 1952, 198 F. (2d) 303, 306. The language quoted,

supra, from *Collifer v. Occhipinti*, 57 So. (2d) 697, 699, is so phrased as to announce a general principle of law, and, accordingly, we consider it binding upon this Court under the *Erie* doctrine.[2] It follows that there was no reversible error in the giving of defendant's requested charge No. 1.

We find no reversible error in the giving of defendant's requested charge No. 14.

> "Number fourteen: Your verdict must be based solely and exclusively on the evidence in the case. You cannot be governed by passion, prejudice, sympathy, or any motive whatever except a fair and impartial consideration of the evidence. And you must not, under any circumstances, allow any sympathy which you might have or entertain for the plaintiff to influence you in any degree whatsoever in arriving at your verdict. The court does not charge you not to sympathize with the plaintiff, because it is only natural and human to sympathize with persons who have sustained loss, affliction or misfortune, but the court does charge you not to allow that sympathy to enter into your consideration of the case or to influence your verdict."

The first two sentences of the charge are admittedly unexceptionable. While the subsequent sentences emphasize the necessity of not allowing sympathy for *the plaintiff* to influence the verdict, and contain no corresponding emphasis as to sympathy for *the defendant*, we

[2] Erie Railroad Co. v. Tompkins, 1938, 304 U.S. 64.

think that that is well within the discretion vested in the trial court.

Plaintiff's requested charge No. 1, on the duty of a motorist to keep a proper lookout, refused by the court, was sufficiently covered, we think, by the court's general charge.

Plaintiff's requested charge No. 7[3] was refused by the court because it came too late, having been offered for the first time after the case was argued to the jury. Rule 51, Federal Rules of Civil Procedure, provides that request for instructions be made "at the close of the evidence or at such earlier time during the trial as the court reasonably directs." While the trial court's discretion to refuse a charge because untimely requested should be sparingly and cautiously exercised,[4] we find no abuse of that discretion in this case, especially in view of the fact that the legal principle requested was substantially included in charge No. 11, given at the request of the defendant.[5]

After it had deliberated for approximately two hours and forty minutes, the jury reported to the court that it was unable to agree. The jury was returned to the courtroom where the following proceedings occurred:

[3] "You are instructed that, in judging whether or not a left-hand turn can be made in safety, a motorist has the right to assume that the oncoming traffic is traveling at a lawful speed and that the driver thereof is exercising a proper lookout and has the vehicle under proper control. Johnson v. Wilson, 97 So. (2d) 674, 679."

[4] See United States v. Ellis, 5 Cir., 1933, 67 F. (2d) 765, 767; 5 Moore's Federal Practice, 2nd ed., Paragraph 51.03, p. 2502.

[5] "I charge you that a person is not negligent for failing to anticipate that other persons will be negligent."

"THE COURT: Madam Foreman, the court has a report from the jury that it is unable to agree. Is that your report?

"THE FOREMAN: That is correct. It's impossible.

"THE COURT: The court will give this additional charge to the jury.

"Ladies and Gentlemen, both the plaintiff and the defendant are entitled to individual judgment of each and everyone of you. At the same time, it is the duty of the minority in the jury to discuss this case with the majority, to listen to the arguments of the majority, to weigh those arguments and see what weight those arguments have in the evidence.

"Likewise, it is the duty of the majority to discuss the case with the minority, to listen to the arguments of the minority, to weigh those arguments, and see what weight those arguments have in the evidence.

"You must realize that you have heard all of the facts in this particular case. It is a case that must be decided. There is no reason to believe that twelve other jurors will be more successful in reaching a verdict in this matter than you will have been. You must give intelligent and cooperative attention to this consideration in order that there may be a resolution of this conflict which exists between the plaintiff and the defendant in this case.

"With those instructions I will ask the jury to retire again for further deliberation.

"(Whereupon, the jury retired at 12:10 o'clock P.M.)

"THE COURT: Do you have a motion?

"MR. ORGAN: If your Honor please, at this time the plaintiff wishes to note an objection to the charge normally, I think referred to as the dynamite charge, given in this case, because the foreman of the jury advised the court squarely that it was impossible to reach a verdict, and object to the return of the jury to the jury room for deliberation in view of the advice of the jury foreman.

"MR. VANDAWORKER: We wish to make the same objection on behalf of the defendant.

"THE COURT: Very well."

Approximately fourteen minutes later, the jury returned with a verdict for the defendant.

The appellant insists that, when the foreman advised the court that it was "impossible" to arrive at a verdict, it became the court's duty to enter an order of mistrial. Clearly, however, it was for the court, in the exercise of its informed discretion, to determine when the deliberations had proceeded long enough. The charge given by the court was modeled upon that approved in *Allen v. United States*, 1896, 164 U. S. 492, 501, 502; see also, *Capital Transit Co. v. Howard*, D. C. Cir., 1952, 196 F. (2d) 593, 596, 597.

We have carefully read the entire record and find no reversible error. The judgment is accordingly

AFFIRMED

A true copy:

Test: EDWARD W. WADSWORTH,

Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.
April 1, 1960.

APPENDIX "B".

JUDGMENT

Extract from the Minutes of March 11, 1960

LEROY L. WILSON

No. 18056 *versus*

SOUTHERN FARM BUREAU CASUALTY COMPANY

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

It is further ordered and adjudged that the appellant, Leroy L. Wilson, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

APPENDIX "C".

LSA-R.S. 32:235 provides in part as follows:

A. The driver of any vehicle on the highways of this state shall ascertain, before turning around upo any highway, that there is no traffic, vehicular or pedestrian, approaching from either direction which will be unduly delayed and shall yield right-of-way to such approaching traffic and shall not attempt to make a turn unless the way is clear.

LSA-R.S. 32:236 provides in part as follows:

A. The driver of any vehicle upon a highway of this state, before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and, if any pedestrian may be affected by such movement, shall give clearly audible signal by sounding the horn; and, whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this Section, plainly visible to the driver of such other vehicle, of the intention to make such movement.

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